

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13

WINKIE MFG. CO., INC.<sup>1</sup>

Employer

and

MANUFACTURING, PRODUCTION & SERVICE WORKERS UNION, LOCAL NO. 24, AFL-CIO

Petitioner

Case 13-RC-20595

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record<sup>2</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>3</sup>

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. A self determination election in the following voting group is appropriate herein (*Phototype, Inc.*, 145 NLRB 1268 (1964)).<sup>4</sup>

All regular seasonal employees employed by the Employer at its facility currently located at 1900 N. Narragansett Avenue, Chicago, Illinois; excluding all other employees, guards and supervisors as defined in the Act.

If a majority of the valid ballots in the election are cast for the Petitioner, they will be taken to have indicated the employees desire to be included in the production and maintenance unit currently represented by the Petitioner, and it may bargain for the employees in the voting group as part of the unit. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees desire to remain unrepresented. In that event, a certification of results of election will issue. *Mount Sinai Hospital* 223 NLRB 507, 508 (1997).

**DIRECTION OF ELECTION\***

An election by secret ballot shall be conducted by the undersigned among the employees in the voting group set forth above in paragraph number 5 at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting group who were employed during the payroll period ending immediately preceding the issuance of the notice

of intent to conduct election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Manufacturing, Production & Service Workers Union, Local No. 24, AFL-CIO

### LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of the full names of voters and their addresses which may be used to communicate with them. ***Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359, fn. 17 (1994).*** Accordingly, it is hereby directed that within 7 days after the issuance of the notice of intent to conduct election 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before the date which will be indicated on the notice of intent to conduct election. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by June 25, 2001.

**DATED** June 11, 2001 at Chicago, Illinois.

/s/Harvey Roth

Acting Regional Director, Region 13

\*/ The National Labor Relations Board provides the following rule with respect to the posting of election notices:

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

- 1/ The names of the parties appear as amended at the hearing.
- 2/ The arguments advanced by the parties at the hearing and in their briefs have been carefully considered.
- 3/ The Employer is a corporation engaged in the manufacture of dance wear from its Chicago Illinois facility.
- 4/ The Petitioner seeks to represent a unit of regular seasonal employees employed by the Employer at its facility currently located at 1900 N. Narragansett Avenue, Chicago, Illinois; but, excluding office clerical employees, plant clerical employees, professional employees, technical employees, outside truck drivers, supervisors and guards as defined in the Act, and all other employees currently represented by a labor organization for the purposes of collective bargaining. The Employer maintains that the employees sought by the Petitioner are temporary seasonal employees with no reasonable expectation of future employment and could not, therefore, be appropriately included in any appropriate unit found herein.

The Employer operates a dance-wear manufacturing facility in Chicago. The Petitioner is the collective bargaining representative of the Employer's regular year around production and maintenance employees, and it is a party to a collective bargaining agreement with the Employer with a term of August 28, 1999 through August 27, 2002 covering the Employer's regular year around production and maintenance employees. The petitioned for seasonal employees have not been included in the unit of regular year around employees represented by the Petitioner. However, no specific exclusion of seasonal employees appears in the collective bargaining agreements description of the unit.<sup>i</sup> The record does not show the number of employees in the unit currently represented by the Petitioner.

The Employer's manufacturing operation is heavily dependent on the use of seasonal employees to manage its production requirements during the dance 'season' which runs roughly between January and late May. The Employer's payroll records shows that it begins hiring seasonal employees in mid-October and its hiring of seasonal employees peaks in January when the vast majority of seasonal employees are hired.<sup>ii</sup> The Employer terminates the seasonal employees in late May when the season ends.

The Employer draws its seasonal employees primarily from Chicago's local Hispanic community, through personal contacts, 'help wanted' ads in a local Spanish language newspaper<sup>iii</sup>, and from telephonic or personal inquires from past seasonal employees. The

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<sup>i</sup> The unit set forth in the parties current collective bargaining agreement is as follows: all production and maintenance employees of the Company, excluding office clerical employees, plant clerical employees, professional employees, technical employees, outside truck drivers, supervisors and guards as defined in the Act and employees belonging to other Unions that have collective bargaining contracts with this firm.

<sup>ii</sup> The payroll records for the fifty seasonal employees working for the Employer at the time of the hearing show that for the 2000 - 2001 season, the Employer hired four of them in October, 2000, one in November, 2000, four in December, 2000, thirty-four in January, 2001, two in February, 2001, and three in March, 2001.

<sup>iii</sup> It is interesting to note that the Spanish language 'help wanted' ad run by the Employer for the year 2001 season, roughly translated, requests that experienced operators of sewing machines apply. There is no indication on the ad that the job was temporary or seasonal in nature.

Employer does not have a policy for the recall of seasonal employees. The Plant Manager testified that the Employer hires seasonal employees on a “first come” basis, giving no preference in hiring to past seasonal employees. However, the record shows that at the end of the season, the Employer provides seasonal employees with the Company’s phone number so that they can inquire about employment next season. Company records and the testimony of the Employer’s book keeper shows that fifteen of the fifty seasonal employees on the payroll at the time of the hearing had previously worked for the Employer<sup>iv</sup>. Returning seasonal employees are not required to fill out new employee information forms as long as there has been no change from the time they first provided basic employee information to the Employer. Beginning with 2000-2001 season, the Employer has required the seasonal employees it hired to sign a form acknowledging that the seasonal employee is a “temporary, casual, seasonal employee without any expectation of future employment in any following season” and is an employee at “will”.

The record indicates that the Employer needed approximately 50 seasonal employees for the 2000 - 2001 season. Accounting for attrition, the Employer hired 63 seasonal employees during the season, and ended the season with 50 seasonal employees on the payroll. For the previous season, the record indicates that the Employer ended the season with approximately 45 seasonal employees - the record does not indicate the total number of seasonal employees hired for that season. The Employer has not hired any regular (non-seasonal) production employees for at least the last two years, filling regular year around employee positions from the ranks of the seasonal employees. The record shows that in the last two years the Employer has filled six regular full time job vacancies from the ranks of the seasonal employees - two vacancies were fill during the 1999 - 2000 season, and four were filled during the 2000 - 2001 season. The Employer did not submit any evidence on its seasonal employee hiring practices and seasonal employees work patterns any farther back than the 1999 - 2000 season. The Employer’s witnesses testified that most records regarding seasonal employee information is only maintained for the current season and the immediately preceding season. Further, the Employer’s plant manager has only been employed by the Employer since the 1999 - 2000 season and could not offer testimony on the hiring practices prior to that season.

With respect to wages hours and other terms and conditions of employment for the seasonal employees, the record shows that the seasonal employees work side by side and hold the same job classifications as the regular year around employees, and they work under the same set of supervisors as the regular year around employees. The seasonal employees are also subject to the same work rules and disciplinary system as the regular year around employees. The seasonal employees do not receive the same benefits as those accruing to the regular year around employees under the terms of the current collective bargaining agreement between the Employer and the Petitioner.

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<sup>iv</sup> The record shows that a total of 63 seasonal employees were hired for the 2000-2001 season of which 17 had previously been employed as seasonal employees by the Employer. The record does not the reason for the attrition of thirteen seasonal employees prior to the end of the season.

## **ANALYSIS AND CONCLUSION**

### ***Separate Unit of Seasonal Employees***

While the Act does not fix specific standards for making determinations as to whether a grouping of employees constitutes an appropriate unit for collective bargaining, the Board to meet its mandate to determine whether a particular grouping of employees constitute an appropriate unit has developed a number of criteria in making such a determination in representation cases. Foremost is the principle that mutuality in wages, hours, and working conditions is a prime determinant of whether a given group of employees constitutes an appropriate unit. *Continental Baking Co.*, 99 NLRB 777, 782 (1952). The community of duties and interests of the employees involved is a major determinant in deciding the appropriateness of a proposed unit. *Swift Co.*, 129 NLRB 1391 (1961). As stated by the Board in *Continental Baking*:

In deciding whether the requisite mutuality exists, the Board looks to such factors as the duties, skills, and working conditions of the employees involved, and especially to any existing bargaining history.

Id. at 782-783.

The community of interest test considers factors such as the degree of functional integration, *Atlanta Hilton & Towers*, 273 NLRB 87 (1984); common supervision, *Associated Milk Producers*, 250 NLRB 1407 (1980); employee skills and functions, *Phoenician*, 308 NLRB 826 (1992); interchange and contact among employees, *Associated Milk Producers*, supra; and general working conditions and fringe benefits, *Allied Gear & Machine Co.*, 250 NLRB 679 (1980).

In the instant matter, the record shows that a separate unit of the Employer's seasonal employees is inappropriate. The seasonal employees herein enjoy no singular community of interest apart from the represented production and maintenance unit which would warrant their inclusion in the separate unit apart from other employees. *Mount Sinai Hospital*, 233 NLRB 507 (1997). Rather, the record shows that the seasonal employees community of interest lies with regular year around production and maintenance employees currently represented by the Petitioner. Thus, the seasonal employees hold the same jobs, work along side, and under the same supervision as the regular year around employees. They are subject to the same rules and regulations as the regular year around employees. The only differences that exist between the seasonal employees and the regular year around employees are that the seasonal employees do not receive the same fringe benefits as the regular employees and the fact that they do not work year around. These differences are insufficient to establish a separate community of interests for a seasonal employee unit in view of the overwhelming community of duties and interests they share with the regular year around employees. *Mount Sinai Hospital*, supra. Accordingly, I find that the seasonal employees may not constitute a separate appropriate unit.

However, inasmuch the seasonal employees herein share a significant community of interests with the existing production and maintenance unit and the Petitioner indicated on the record that it would proceed to an election even if another unit was found appropriate, I find it would be appropriate to consider whether the seasonal employees may appropriately be included in the existing unit through a self-determination election. *Mount Sinai Hospital*, supra. This

requires resolution of the issue presented by the Employer - whether the disputed seasonal employees are casual temporary employees excluded from any unit found appropriate.

***Status of the Seasonal Employees***

The Board has historically included regular seasonal employees in bargaining units if the employees have a reasonable expectation of reemployment in the foreseeable future. *Maine Apple Growers, Inc.*, 254 NLRB 501 (1981); *California Vegetable Concentrate*, 137 NLRB 1779 (1962); *Baumer Foods*, 190 NLRB 690 (1971). In deciding whether seasonal employees are eligible voters, the Board:

[A]ssesses the expectation of future employment among seasonal employees...the Board considers such factors as the size of the area labor force, the stability of the employer's labor requirements and the extent to which it is dependent upon seasonal labor, the actual reemployment season to season of the worker complement, and the employer's recall or preference policy regarding seasonal employees. (footnotes omitted.)

*Maine Apple Growers*, 254 NLRB 501, 502 (1981). Temporary or casual seasonal employees without a reasonable expectancy of future re-employment are excluded from the bargaining unit. *Macy's East*, 327 NLRB 73 (1998); *L & B Cooling*, 267 NLRB 1, 2-3 (1983); *Post Houses*, 161 NLRB 1159 1172-1173 (1966). It is Board policy that unit placement and voting eligibility are inseparable issues; any employee who may be represented as the result of an election has the right to vote in the election. *Sears, Roebuck & Co.*, 112 NLRB 559, fn. 28 (1955); *Post Houses*, *supra*.

The record demonstrates that the Employer production needs are dependent upon seasonal labor to met the demand for costumes during the dance season, January through May of each year, and that the seasonal employees augment the Employer's regular year around employees in meeting the increased seasonal production demands. The Employer's dependence upon seasonal labor to meet its production needs is stable, recurring, and fairly predicable as to both the number of employees needed and the times that their services are required. Further, the seasonal employees perform the same duties under the same supervisors as the Employer's regular employees. Thus, these factors favor finding the seasonal employees to have a reasonable expectancy of re-employment. *Kelly Bros. Nurseries*, 140 NLRB 82, 85 (1962).

The record shows that the Employer draws its recurring and predicable seasonal employment needs from the same labor market each season, *i.e.* the Chicago Hispanic community. While this labor market is larger than that considered by the Board in *Kelly Bros. Nurseries*, *supra* in finding the seasonal employees there to have a reasonable expectancy of re-employment, it is nevertheless not so large that it is a factor negating a reasonable expectancy of re-employment as was found in *L & B Cooling, Inc.*, *supra* at 2 (1983). In that case the labor market covered all itinerants in the Southwest United States. Here, the labor market is confined to a specific population in the Chicago metropolitan area. This is sufficiently identifiable so that seasonal employees can reasonably obtain notice of and seek out future re-employment opportunities with the Employer. That this occurs is borne out by the fact that the record demonstrates a degree of continuity of re-employment among seasonal employees working for the Employer. On balance, I find that this factor favors finding that the seasonal employees herein have a reasonable expectancy of re-employment.

The record shows that Employer stated policy is to hire on a “first come” basis and to not give any hiring preference to applicants who worked in the prior season. The Employer maintains no list of former seasonal employees, and, with one exception, the Employer makes no effort to contact or recall former seasonal employees for available work. The record further shows that for the most recent season the Employer implemented a form in which newly hired seasonal employees acknowledge that they have no they have no expectancy of future employment. I find that the lack of preference for former seasonal employees in hiring mitigates against the seasonal employees having a reasonable expectancy of re-employment. *L & B Cooling, Inc., supra* at 3.

With regard to the factor of actual re-employment of seasonal employees from one season to the next, the record demonstrates that approximately 30 percent of the Employer’s seasonal workers for the 2000 - 2001 season were employees that had worked for the Employer in prior seasons. In *Saltwater, Inc.*, 324 NLRB 343 (1997), the Board citing to *Kelly Bros. Nurseries, supra* noted that the Board has included as eligible voters seasonal employees whose return rate was in the 30 percent range. See also, *P. G. Gray*, 128 NLRB 1026 (1960). Furthermore, the continuity of employment opportunities for the seasonal employees is enhance herein as the record discloses that the Employer has, for at least the past two years, exclusively used the ranks of the seasonal employees to replenish the ranks of its regular year around employee complement. *California Vegetable Concentrates, Inc. supra* at 1780. Accordingly, I find that this factor weights in favor of finding the seasonal employees herein have a reasonable expectancy of re-employment.

Weighing my findings on the foregoing factors and the record as a whole, I find, on balance, that the seasonal employees herein have a reasonable expectancy of re-employment. *Maine Apple Growers, supra*. I further find, inasmuch as they have a community of interest with the production and maintenance employees in the existing unit, that they constitute an appropriate voting group for a self-determination election as to whether they wish to represented by the Petitioner in the existing unit. *Mount Sinai Hospital, supra*.

The Employer in contending that the seasonal employees herein are casual or temporary seasonal employees relies heavily on the Board’s decisions in *Macy’s East, supra* and *Freeman Loader Corp.*, 127 NLRB 514 (1960). I find each of these cases to be inapposite to the case at hand. Specifically, in *Macy’s East*, there was no evidence that the Employer has a practice of employing the same employees year-to year, and the Board noted “significantly” that none of the eight disputed employees in that case had previously worked for the employer. Furthermore, there was no evidence that any of the disputed employees ever achieved permanent employment with the company. These critical facts stand in contrast to the facts herein insofar as the Employer, at a minimum, authorizes the disputed employees to inquire as to the availability of work season to season, rehires a significant number of former seasonal employees, and that the Employer exclusively utilizes the ranks of the seasonal employees to replenish the ranks of its regular year around employee complement. In *Freeman Loader*, the disputed employees worked during a roughly two month period in the spring, working generally in unskilled laborer positions. Only occasionally did any seasonal employees return to work for the employer, and rarely did any of seasonal employees become permanent employees. Furthermore, *Freeman*

*Loader*, like other cases cited by the Employer in support of its position<sup>v</sup>, pre-date *Maine Apple Growers*, *supra* and utilized the standard whether the seasonal employees “have sufficient interest in the terms and conditions of employment to warrant their inclusion in the unit” (*Freeman Loader*, *supra* at 515) rather than analyzing the seasonal hiring practices of the employers under all the factors set forth in *Maine Apple Growers*. See also, *Macy’s East*, *supra*; *L & B Cooling*, *supra* at 2 (1983). Accordingly, I find the cases cited by the Employer to factually distinguishable and/or are not controlling as the application of the appropriate standard for determining the status of seasonal employees. Accordingly, these cases, therefore, do not require a different result from that which I have reached herein.

For the reason set forth herein, I have found that it is appropriate to conduct a self determination election among the Employer’s seasonal employees to determine if they wish to be represented by the Petitioner in the existing production and maintenance unit. *Phototype, Inc.*, 145 NLRB 1268 (1964). The election will be conducted in the voting group and pursuant to the terms set forth above in paragraph 5. Further, inasmuch as the voting group consists of seasonal employees and the season of their current term of employment has passed, the election will be conducted on a date in the future to be determined by the undersigned at or near the seasonal peak between January and March pursuant to the procedures set forth above in the Direction of Election paragraph.

As I have directed an election that is not in the unit sought and is based upon different terms and premises than that sought by the Petitioner, the Petitioner is permitted to withdraw its petition without prejudice upon written notice to me within 10 days from the date of this decision or, if applicable, from the date the Board denies any request for review of the findings herein. *Independent Linen Service Company of Mississippi*, 122 NLRB 1002 (1959).

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<sup>v</sup> *F.W. Woolworth Company*, 119 NLRB 480 (1957); *Great Atlantic and Pacific Tea Company*, 116 NLRB 1463 (1956); *Individual Drinking Cup*, 115 NLRB 947 (1956); and, *Montgomery Wards* 110 NLRB 256 (1954).